91-473

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Louisiana

PETITION FOR A WRIT OF CERTIORARI

CECIL L. JOHNSON
DONALD M. CLEMENTS, JR.
GULF STATES UTILITIES COMPANY
P.O. Box 2951
Beaumont, TX 77704
(409) 838-6631

EDGAR M. ROACH, JR.*
WILLIAM D. JOHNSON
HUNTON & WILLIAMS
One Hannover Square
Raleigh, NC 27601
(919) 899-3000

TOM F. PHILLIPS
FRANK M. COATES, JR.
FREDERICK R. TULLEY
JAMES L. ELLIS
TAYLOR, PORTER, BROOKS & PHILLIPS
P.O. Box 2471
Baton Rouge, LA 70821
(504) 387-3221

Counsel for Gulf States Utilities Company

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Public utility companies have the right under the Fifth Amendment to the United States Constitution to just compensation for the capital they invest in providing service to the public. Regulators can circumvent the constitutional requirement of just compensation by erroneously categorizing certain investments or portions thereof as imprudent or unnecessary and therefore not "taken for public use," even though the investment is in fact dedicated to serving the public. This case presents a question involving the due process protection required when state regulators make the adjudicative determination of whether certain investments were prudently made and thus will be included in the applicable ratemaking methodology for determining just compensation:

> Whether a utility's Fourteenth Amendment due process right to a fair hearing before an impartial fact finder is denied when the attorneys and expert witnesses who participated in the hearings as the utility's adversaries are also allowed to participate in the decision making process as the initial finders of fact.

PARTIES BELOW

Gulf States Utilities Company was the Appellee for Case No. 88-CA-0709 and the Appellant-Appellee for Case No. 90-CA-0445 in the Supreme Court of Louisiana. The appeals were consolidated by the Supreme Court of Louisiana.

The Louisiana Public Service Commission was the Appellant for Case No. 88-CA-0709 and the Appellee-Appellant for Case No. 90-CA-0445.

The State of Louisiana, *ex rel.* William J. Guste, Jr., Attorney General intervened in the proceeding and was an Appellant in both cases before the Supreme Court of Louisiana.

RULE 29.1 STATEMENT

Gulf States Utilities Company has no parent company and has only wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gulf States Utilities Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Louisiana Supreme Court entered in Case Nos. 88-CA-0709 and 90-CA-0445 on April 5, 1991.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court (App. 1a) is reported at 578 So.2d 71 (La. 1991). The opinion of the Nineteenth Judicial District Court of the State of Louisiana dated October 11, 1989 (App. 92a) is unreported. The order of the Louisiana Public Service Commission dated December 15, 1987 (App. 256a) and the majority opinion in connection with that order (App. 210a) are unreported.

JURISDICTION

The Louisiana Supreme Court issued its opinion on April 5, 1991 and denied Gulf States Utilities Company's Application for Rehearing on June 20, 1991 (App. 89a). This Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendment V, Clause 3:

> "[No person] shall be deprived of property without due process of law. . . ."

The United States Constitution, Amendment V, Clause 4:

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[1] The Louisiana Supreme Court upheld the Commission's ratemaking order against Gulf States' challenge that the order violates Gulf States' right under the Fifth and Fourteenth Amendments to the United States Constitution. State ratemaking orders are considered to be state statutes within the meaning of 28 U.S.C. § 1257. *Lake Erie & Western R.R. Co. v. Public Utils. Comm'n*, 249 U.S. 422, 424 (1919). *See generally Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

"[N]or shall private property be taken for public use, without just compensation."

The United States Constitution, Amendment XIV, § 1, Clause 3:

"[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

Introduction

This case arises out of a finding of imprudence by the Louisiana Public Service Commission (the Commission) with respect to 48 percent of the investment of Gulf States Utilities Company (Gulf States) in the River Bend nuclear generating station (River Bend). As a result of that finding, Gulf States' investors will receive from its Louisiana customers no return of or return on that portion of their investment in a power plant that has provided utility service to the public since June 1986.[2] The Commission denied compensation for this investment because it found that Gulf States had acted imprudently when it restarted construction of River Bend in 1979, after having placed the project on hold in 1977. The Commission concluded that Gulf States should have constructed a lignite plant instead of completing the nuclear plant.

The issue here concerns the manner in which the hearing in this proceeding was conducted and the fairness of the fact-finding process. A hearing examiner, not the Commissioners, presided over the hearings, but the ex-

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[2] The total cost of River Bend was approximately $4.4 billion. Gulf States invested approximately $3 billion in River Bend. The rest was contributed by Cajun Electric Power Cooperative, which owns a 30 percent undivided interest in River Bend. A portion of the $3 billion invested by Gulf States is attributable to service provided by Gulf States in Louisiana, and the balance is attributable to Gulf States' Texas operations. Thus, the Commission's conclusion that $1.4 billion of Gulf States' overall River Bend investment was imprudent resulted in a Louisiana jurisdictional disallowance of $677 million.

aminer was not authorized to make any findings of facts or reach any conclusions. Instead, the Commission instructed its retained lawyers and consultants to prepare a "fair and objective" analysis of the evidence and to draw conclusions on the crucial issue of prudence. Those lawyers, who had acted as adversaries of Gulf States throughout a prolonged investigation, and consultants, who presented sworn testimony at the hearing that Gulf States had been imprudent, concluded that the positions they had advocated were more credible and persuasive than those advocated by Gulf States. The Commission rejected Gulf States' argument that a review of the facts by an impartial third party was necessary and adopted the findings of its lawyers and consultants almost verbatim.

Gulf States believes that the use of this procedure denied it a fair hearing before an impartial tribunal on the issue of prudence. Unlike other ratemaking issues such as depreciation rates, cost of capital, and accounting conventions, prudence issues require an assessment of the reasonableness of a utility's past conduct. In proceedings such as this, where administrative agencies define substantial property rights based on findings of adjudicative fact, due process requires a hearing in which the evidence is heard and evaluated by a person who has not already taken a position on the merits of the case.

Background

The Construction of River Bend

For several decades prior to 1971, Gulf States relied upon gas-fired plants to generate the energy required to serve the ever increasing demands of its customers. When the need for a new generating plant was identified in the early 1970s, severe natural gas curtailments and other factors prompted Gulf States to seek a different form of generation. Studies performed by and for Gulf States, as well as Atomic Energy Commission publications and industry-wide data, demonstrated the economic superiority of the nuclear option. To meet its objective of serving

customer demand with a diversified fuel mix, Gulf States commenced a two-unit nuclear project in August 1971 named River Bend.[3] (App. 6a).

In early 1977, however, Gulf States placed the River Bend project on hold due to uncertainty in its projections of load growth and difficulties in financing the project. (App. 7a). In 1978, new load growth studies again showed that Gulf States needed additional generating capacity to meet its customers' demands for electricity.[4] After considering various alternatives, Gulf States decided to complete River Bend; in December 1978, Gulf States obtained a rate increase from the Louisiana Commission to support the construction of that plant. (App. 9a).[5] When site work resumed at River Bend in 1979, Gulf States estimated that the total cost to complete the first River Bend unit would be $1.7 billion.

Like virtually all contemporary nuclear power plants, however, River Bend cost considerably more than initially estimated. River Bend was completed in 1986 at a final

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[3] Due to a decrease in projected load growth, the second River Bend unit was canceled in 1984.

[4] The decision to restart River Bend also was influenced by Congress' passage of the Fuel Use Act of 1978, which prohibited the use of gas-fired generating units after 1989. Gulf States faced the prospect of replacing 3,400 megawatts of its gas-fired generating capacity by 1990.

[5] Gulf States also operates in and is subject to regulation by the State of Texas. Texas requires utilities to obtain a certificate from its Public Utility Commission prior to constructing new generating facilities. Gulf States sought and obtained a certification order from the Texas Public Utility Commission in 1978 approving the construction of River Bend. (App. 9a). In the River Bend rate case held before the Texas Commission in 1986, opposing witnesses presented the same general argument that was presented in Louisiana—that Gulf States was imprudent in restarting River Bend in 1979 rather than building a coal plant. The Texas Commission rejected the argument there, finding that "GSU's decision to restart and build River Bend was prudent." Order of Texas Public Utility Commission in Docket Nos. 7195 and 6755, May 16, 1988, Finding No. 118.

cost of $4.4 billion. The increased cost of River Bend was attributable to numerous factors, many of which were industry-wide phenomena beyond Gulf States' control, including the incident at the Three Mile Island nuclear plant, changing regulatory requirements and inflation.[6]

The River Bend Rate Case

The significance of this rate case to Gulf States and its customers was clear well before Gulf States filed its request for a rate increase to recover its investment in River Bend. The Louisiana portion of Gulf States' rate base, excluding River Bend, was $832 million. The amount of Gulf States' investment in River Bend attributable to service in Louisiana was $1.4 billion. The potential impact on Gulf States' rates of including its River Bend investment in rate base was obvious.[7]

In anticipation of the rate case, the Commission hired the consulting firm of Kennedy & Associates (the Consultants) to investigate the prudence of Gulf States' actions at River Bend.[8] The Commission also hired two law firms to participate as Special Counsel in the prudence

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[6] There is no finding in this case that the increased cost of River Bend above the 1979 estimate is attributable in any way to Gulf States' imprudence.

[7] Rate base is a utility's investment in the assets used to provide public service. C. Phillips, *The Regulation of Public Utilities*, 301 (2nd ed. 1988). The determination of rate base significantly impacts overall rate levels. Rate regulation sets rates at a level that provides the utility an opportunity to earn revenues to cover its operating expenses and capital costs. That level of revenues typically is defined as:

> Revenue Requirement = Operating Expenses + (Rate Base × Weighted Average Cost of Capital).

[8] The Commission also hired the consulting firm of O'Brien, Kreitzberg & Associates to participate in the prudence investigation. Kennedy & Associates, however, did most of the work and ultimately presented testimony on the key issues in the rate case. The Commission also hired Komanoff Energy Associates, who did not participate in the prehearing investigation and whose role in the hearing was relatively narrow. (App. 282a-83a).

investigation and subsequent rate case. Special Counsel and the Consultants conducted discovery of Gulf States and undertook studies to reconstruct Gulf States' 1979 "planning environment," in order to assess the reasonableness of Gulf States' decision to restart River Bend and the viability of other options. (App. 282a-90a).

The parties presented their views on Gulf States' prudence at a hearing that lasted 40 days. Fifty-three witnesses, including the Consultants, prefiled over 3,000 pages of testimony; the hearing transcript exceeded 7,000 pages, and several hundred exhibits were admitted. (App. 18a and 21a). The most significant and controversial issue, by far, was the prudence of Gulf States' decision to restart construction of River Bend. The Consultants presented sworn testimony that Gulf States had been imprudent in restarting the nuclear unit. In their view, Gulf States should have built a lignite plant instead of River Bend. The Consultants opined that Gulf States' imprudence resulted in $1.4 billion of unnecessary expenditures, representing the difference between the cost of River Bend and the cost of the lignite plant the Consultants believed should have been built.

Gulf States contested the Consultants' conclusions and presented expert testimony showing that its decision to restart River Bend had been prudent. Moreover, Gulf States argued that the reasonable alternative to River Bend identified by the Consultants—construction of a lignite plant—was not feasible and would not have appeared feasible from the Company's perspective in 1979.

The five Commissioners, however, did not observe first hand the parties' presentations of this evidence. Instead, the Commissioners appointed a member of the Commission staff as a hearing examiner, and he presided over the hearing.[9] This hearing examiner was the only person

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[9] Commissioner Lambert and representatives of some of the other Commissioners attended some parts of the hearing. (App. 17a). See note 29, *infra*, for additional discussion on this point.

(other than participating lawyers and witnesses) who attended all of the hearings, observed all of the witnesses, and heard all of the testimony, yet he took no part in the decision making process. Instead, the Commission assigned the task of assessing the evidence presented and recommending how the issues should be resolved to its Special Counsel and Consultants—the same individuals who had advocated a finding of imprudence against Gulf States during the hearing.

With the assistance of the Consultants, Special Counsel authored the Report of Special Counsel (Report) (App. 18a), a purportedly unbiased assessment of the evidence presented and recommendation for decision. The Report, initially filed with the Commission on November 5, 1987,[10] concluded that the evidence presented by the Consultants was credible and persuasive and that the evidence presented by Gulf States' witnesses was not. The Report recommended that Gulf States' decision to restart River Bend be found imprudent and that $1.4 billion of Gulf States' investment in River Bend be disallowed.

When Special Counsel and the Consultants assumed the role of fact-finder after months of adversarial participation in the proceeding, Gulf States objected, noting that it was inconsistent for Special Counsel to attempt to assume an impartial stance after serving as advocates against the Company.[11] Gulf States subsequently at-

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The Commissioners also were provided with summaries of testimony prepared by Special Counsel and the Consultants. (App. 21a). See note 27, *infra*, for additional discussion on this point.

[10] A revised version of Special Counsel's Report was filed on November 19, 1987 and appears in the Appendix to this Petition as Appendix H.

[11] Gulf States' counsel noted that Special Counsel was taking the position that he was "not now an adversary" and was now acting as an impartial and objective participant. (Transcript October 6, 1987, pp. 23-24). Gulf States' counsel further observed that Special Counsel had consistently acted as an adversary during the hearings. (*Id.*). He concluded that any *ex parte* consultation between Special Counsel and the Commission would be inappropriate and would violate Gulf States' procedural due process rights. (*Id.*).

tempted to address the partisan nature of Special Counsel's Report during oral argument before the Commission on November 10, 1987. The Commission refused to allow Gulf States to rebut Special Counsel's Report in that forum; at Gulf States' request it was given ten days to file written exceptions. On December 15, 1987, the Commission issued Order No. U-17282-C, in which it adopted the position of Special Counsel and the Consultants that Gulf States' decision to restart the River Bend project had been imprudent. (App. 257a). The Commission also adopted Special Counsel's and the Consultants' conclusion that Gulf States should have built a lignite plant instead of River Bend and that the economic impact resulting from Gulf States' imprudence amounted to $1.4 billion. (*Id.*). On January 28, 1988, the Commission issued its majority opinion in connection with its December 15, 1987 order; the conclusions and findings of imprudence in connection with River Bend were essentially verbatim copies of Special Counsel's Report.[12]

On December 30, 1987, Gulf States filed a Petition on Appeal and Motion for Preliminary Injunction with the Nineteenth Judicial District Court of the State of Louisiana, Parish of East Baton Rouge. One of the grounds for Gulf States' appeal was that the Commission's hearing process had denied Gulf States due process of law. Specifically, Gulf States argued:

> The Commission neither heard the evidence nor had the benefit of recommended findings of the hearing officer. Instead, the only "findings" relied upon by the Commission were those of . . . counsel for the Commission, who was an advocate during the hearing process. There were no impartial findings or recommended findings to which Petitioner could take exception. The Commission's decision also made reference to the recommendations of its outside consultants,

[12] A comparison of Special Counsel's Calculation of Economic Damages (App. 296a-98a) with the determination of damages in the Commission's Majority Opinion (App. 244a-47a) illustrates the Commission's verbatim adoption of Special Counsel's conclusions.

> which recommendations were based, in part, upon those consultants' determinations as to the credibility of various witnesses in the case. The Commission thereby abdicated its role as adjudicator and finder of fact; the entire hearing process itself became a mere formality, and the ultimate decision of the Commission was not based upon the record.

Petition on Appeal and Motion for Preliminary Injunction of Gulf States, p. 9, ¶ 24.

On October 11, 1989, the Nineteenth Judicial District Court, Parish of East Baton Rouge issued its Judgment. (App. 92a). The District Court found that Special Counsel and the Consultants had collaborated in conducting the prudence investigation and in presenting their case during the hearing. (App. 118a). The District Court also observed that the hearing examiner had made no findings, no evaluation of the witnesses' credibility, and no recommendation on the disposition of the issues. (*Id.*). Instead, the District Court found that the Commission had been presented with Special Counsel's Report, authored primarily by Kennedy & Associates in conjunction with Special Counsel and the other consultants, which included summaries of testimony and recommendations on the disposition of the prudence issue. (App. 119a). Finally, the District Court noted that "a considerable portion of [Special Counsel's] report is embodied verbatim in the Commission's majority [opinion]." (*Id.*). Nevertheless, the District Court rejected Gulf States' due process argument. The District Court's decision was based partially on the deferential standard of review the court accorded the Commission's order. (App. 126a).

On January 19, 1990, Gulf States filed its Motion for Devolutive Appeal to the Louisiana Supreme Court. Gulf States again argued that the proceeding before the Commission violated Gulf States' right to due process.[13] The

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[13] In its specification of errors to the Louisiana Supreme Court, Gulf States argued that the Commission's "hearing 'procedure' in the prudence evaluation did not provide a fair, unbiased hearing

Louisiana Supreme Court upheld the Commission's order despite Gulf States' due process argument. The court recognized that the same individuals who had acted as counsel and witnesses during the hearing had also participated in the decision making process. (App. 22a). The court, however, refused to find such mixing of roles in the same individuals to be inappropriate. The court relied heavily on its characterization of ratemaking as "legislative" and on lower federal court decisions allowing such mixing of roles in the context of administrative rulemakings. (App. 22a-23a).

On April 19, 1991, Gulf States applied for rehearing by the Louisiana Supreme Court. The court denied Gulf States' Application for Rehearing on June 20, 1991. (App. 91a).

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE

The central question in this case is what process is constitutionally due when utility regulators adjudicate whether a property interest has been taken for public use. Procedural adequacy is always a major consideration when governmental action interferes with a significant property interest. Procedural safeguards have added significance in rate regulation because of the magnitude and national importance of the property interests at stake and the judicial deference accorded to the findings, conclusions and methodologies employed by utility regulators. The question presented has national significance for the producers, consumers and regulators of utility services, and should be answered by this Court.

In utility ratemaking, "the guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is

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process and therefore did not comport with the due process guarantees of . . . the United States Constitution." (Memorandum of Gulf States to the Louisiana Supreme Court, p. 11).

so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (citations omitted). The constitutional sufficiency of the compensation for property in service to the public is measured by an "end result" analysis, which inquires into the impact of the compensation level and not the ratemaking methodology by which that result was derived. "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).[14]

Of course, the sufficiency of compensation is a function of the value of the property that has been taken for public use. "[W]hether a particular rate is 'unjust' or 'unreasonable' will depend to some extent . . . on the amount of capital upon which the investors are entitled to earn that return." *Duquesne*, 488 U.S. at 310. The threshold determination of the amount of the investment that is compensable is entrusted to utility regulators, who in the past decade have determined that almost $14 billion in utility investments need not be compensated by utility customers.[15] Regulators wield enormous power in making these determinations, which can have profound financial

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[14] Even under the *Hope* end result test, with its narrow scope of review, regulators must employ due process protections in the decision making process. Indeed, the end result test is predicated on the assumption that the proceedings before a regulatory commission gave the utility a full, fair opportunity to be heard. *See FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942) ("*Once a fair hearing has been given* . . . the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped." (emphasis added)).

[15] Oak Ridge National Laboratory, *Prudence Issues Affecting the U.S. Electric Utility Industry* (December 1987), as updated for 1987-1990 activities. From 1980 through 1990, regulators have refused to compensate utilities for approximately $13.8 billion out of approximately $106 billion invested in new generating facilities. More than half of the amount denied compensation was determined to be imprudent.

effects on utilities. This case provides a perfect example—Gulf States invested $3 billion in River Bend, which is currently providing electric service to the using and consuming public, but the Louisiana Commission decided that only slightly more than one-half of this investment was compensable by ratepayers.

The significance of a commission's prudence determination is heightened by the lack of substantial judicial review. Whether a utility investment is compensable or not necessarily turns on issues of fact, often technical and complex in nature. Once a regulator determines that a utility investment is not compensable, that decision will rarely be disturbed. *See, e.g., Hope*, 320 U.S. at 602 (a commission's order is the product of expert judgment and carries a presumption of validity).[16] This limited review of regulatory determinations permits utility regulators in large part to define their own authority and obligations under the Takings Clause of the Fifth Amendment.

Utility regulation directly affects the entire population of the country. The most immediate effect is one of personal economics, where the cost of utility service is paid by individual consumers at rates set by utility regulators. But the decisions of regulators can have much more profound and broader impacts. The regulatory determinations of the last decade, which have denied compensation for many billions of dollars of utility investments, have produced a threat to the adequate and reliable supply of electricity in this country.

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[16] The standard of review applied by the Louisiana courts is typical of the deferential treatment accorded the decisions of utility regulators. The inquiry for Louisiana courts reviewing a Commission order is whether the Commission acted unreasonably or arbitrarily. *Louisiana Power & Light Co. v. Public Serv. Comm'n*, 523 So. 2d 850, 854 (La. 1988). Absent an error of law or a total lack of reasonable basis in the evidence, a court will not overturn the Commission's findings. *CTS Enterprises, Inc. v. Public Serv. Comm'n*, 540 So. 2d 275, 278 (La. 1989).

The demand for electricity in the United States continues to grow, but few utilities are building plants to meet this long term demand.[17] Having experienced harsh treatment from state regulators during the past decade, in which they were denied recovery of billions of dollars invested to serve the public, many utilities are hesitant to put additional capital at risk in new construction programs. This reluctance has been noted in a report produced for the Department of Energy:

> Cost disallowances for many utilities threaten the economic health of the companies. The disallowances, which deny full construction cost recovery to utilities, have had a negative effect on the ordering of any new base load power plants, either nuclear or coal. . . . This situation has led to a major national concern that adequate, reliable and economic electric power may not be available to meet future needs of the country.[18]

The Department of Energy has reached a similar conclusion on its own:

> The present climate of utility regulation in many states discourages new capital investment, and this restricts the range of new supply options that might otherwise be considered. A fundamental responsibility of a utility regulator is to balance customer's

[17] The Energy Information Administration (EIA), an independent statistical and analytical agency within the U.S. Department of Energy, expects sales of electricity to grow at up to 2.1 percent annually through the year 2010, with demand reaching 4470 billion kilowatt hours. Based on its analysis of demand for electricity and the ability of utilities to meet this demand, the EIA recently projected that "by 2010, electricity demand growth is projected to make necessary the construction of between 127 and 272 gigawatts of new generating capacity *beyond that already announced*." Energy Information Administration, *Annual Outlook For U.S. Electric Power 1991*, pp. x, 10-13 (1991) (emphasis added). Electric utilities currently have plans to build only 47 gigawatts by the year 2000 and 50 gigawatts (cumulative) by 2010. *Id.* at x.

[18] Oak Ridge National Laboratory, *Prudence Issues Affecting the U.S. Electric Industry*, p. v.

> welfare with that of company stockholders; but in recent years the traditional compact in such regulation (which balanced limited risks with limited rewards) has been broken.[19]

Given the power they wield and the national significance of their decisions, utility regulators must incorporate substantial procedural safeguards to ensure that their decisions are based on a balanced and careful consideration of factual data. This is especially true when the regulators are making adjudicative determinations about whether a certain investment is compensable. This Court has noted the need for substantial due process protections in this situation:

> Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" of a fair and open hearing be maintained in its integrity.

Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 304 (1937) (citations omitted).

The absence of these "inexorable safeguards" creates a risk that property interests will be taken without any compensation. The constitutional requirement of just compensation can be frustrated by an erroneous determination that certain investments are imprudent or unnecessary and thus have not been "taken for public use," even though the investment is in fact dedicated to serving the public. The risk of error in making such a determination

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[19] U.S. Dep't of Energy, *Energy Security—A Report to the President of the United States*, p. 154 (March 1987).

is a function of the process employed to make the determination. And as noted in *Ohio Bell*, the probability that such an error will be corrected through judicial review is slight.

This case presents the Court with an opportunity to ensure that regulatory decisions concerning substantial property rights that affect the national interest are made with the appropriate and constitutionally required level of process. In *Duquesne*, this Court reiterated the deferential standard of review under the Takings Clause to be accorded the results of ratemaking. This Court should state with equal clarity that the deferential end result test established in *Hope* does not give state regulatory commissions license to abridge the procedural safeguards mandated by the Fourteenth Amendment. To the contrary, the limited scope of the *Hope* end result test mandates strict adherence to the constitutional requirements that ensure that the end result is the product of a fair hearing.

II. THE PROCEDURE USED BY THE LOUISIANA COMMISSION DENIED GULF STATES DUE PROCESS

The issue presented here is fundamental—was the question of Gulf States' prudence in completing River Bend *fairly* decided? More precisely, the issue is whether the question *could* be fairly decided, given the procedure that was used by the Louisiana Commission. The answer is that the procedure used by the Commission prevented it from hearing and deciding the issue of Gulf States' prudence fairly.

Prudence questions inquire into the reasonableness of a utility's past conduct.[20] Their resolution requires an

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[20] The Louisiana Supreme Court noted that the prudence standard used by the Commission

> "essentially applies an analog of the common law negligence standard for determining whether to exclude value from rate

understanding of historical fact and an appreciation of the challenged conduct within this historical context. They involve the application of technical expertise to these facts, to determine whether the challenged conduct was reasonable or not given the circumstances. Prudence inquiries are not forums for administrative policy decisions or rulemaking; they are the administrative equivalent of a judicial trial, where matters of witness credibility and veracity, weight of evidence, and the like are paramount. In these instances, where regulators act in an adjudicative capacity to decide contested issues of fact, due process requires at the very least that the evidence presented in the proceeding be heard and evaluated by some person who has not already acted as an advocate or witness in the case. The Commission's procedure denied Gulf States this basic right.

Given the length of the hearing, the immensity of the record, and its decision not to hear the case itself, the Commissioners needed assistance in sifting through and weighing the conflicting evidence. Rather than relying on a competent and unbiased third party such as the hearing examiner for this assistance, the Commission made its Special Counsel and Consultants fact finders.[21] After months in their adversarial role,[22] where they strenuously

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base." That is, the utility must demonstrate that it "went through a reasonable decision making process to arrive at a course of action and, given the facts as they were or should have been known at the time, responded in a reasonable manner."

(App. 27a) (citations omitted).

[21] The Commission apparently has allowed hearing examiners to make initial findings and conclusions in cases that are less significant than large rate cases. *See, e.g., Radiofone, Inc. v. Public Serv. Comm'n*, 573 So. 2d 460 (La. 1991). This creates the incongruous result of providing lesser procedural safeguards in cases involving the most substantial property interests.

[22] There is no question that the relationship between Special Counsel and the Consultants and Gulf States was adversarial. As Special Counsel's Report described the situation, there was "a

asserted the imprudence of Gulf States, Special Counsel and Consultants were suddenly thrust into a new role—that of the impartial fact finders on the issue of Gulf States' prudence. They were requested to provide "the Commission with an *objective and fair* analysis of the evidence." (Reply Brief of the Commission in Opposition to Gulf States' Application for Rehearing to the Louisiana Supreme Court, p. 17) (emphasis added). In other words, they were requested to decide, fairly and objectively, which was more persuasive—the position they had developed and presented, or the diametrically opposite position taken by Gulf States.

Special Counsel's and the Consultants' choice can be no surprise: They chose the position they had asserted at the hearing. They evaluated the weight of the evidence and the credibility of the witnesses and concluded in each and every instance that the Consultants' own testimony was more persuasive and more credible than that of Gulf States. They could not be expected to have done otherwise. They had spent months, and had been paid considerable sums of money, to determine whether Gulf States had acted prudently in restarting River Bend. The Consultants had testified *under oath* that, in their professional opinion, Gulf States unquestionably had been imprudent. There simply was no other decision that Special Counsel and the Consultants could reach; they were incapable of preparing an "objective and fair analysis of the evidence."

Despite the obvious bias of Special Counsel and the Consultants, the Commission relied on the Report of Special Counsel in the same way as it would have the recommendation of a neutral hearing examiner. Accepting the Report as "an objective and fair analysis of the evidence," the Commission rejected the notion that the Report might be biased:

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constant thread of disagreement between the company and staff witnesses [*i.e.*, the consultants] on most major points." (App. 312a). This disagreement extended to "most aspects of River Bend 1, especially since the restart. . . ." (*Id.*).

> [T]he true role of the consultants and counsel is to recommend a reasonable decision. The objective appraisal sought by Gulf States is redundant.

(Reply Brief of the Commission in Opposition to Gulf States' Application for Rehearing to the Louisiana Supreme Court, p. 18). The Commission adopted the Report of Special Counsel as its own, incorporating it almost verbatim into its Majority Opinion that held Gulf States imprudent.[23]

For Special Counsel and the Consultants to act the part of, and be accepted as, the fair and objective fact finders was inherently *unfair*; it assured that the position of Special Counsel and the Consultants would triumph, regardless of the evidence presented by Gulf States. This is incompatible with basic concepts of due process:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our

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[23] The Louisiana court found that Gulf States was "granted a full day hearing to argue its case" and was allowed to file exceptions to the Report of Special Counsel. (App. 21a). In reality, Gulf States' "full day hearing" was only one hour, with the rest of the day consumed by oral argument of the other parties (including Special Counsel). The Commission refused to hear arguments of Gulf States addressing the bias in Special Counsel's Report. (Tr. of Oral Argument, November 10, 1987 at 171-76).

With regard to the opportunity to file exceptions, the Commission's acceptance of Special Counsel's Report as an impartial weighing of the evidence vested that Report with a presumption of validity. *See NLRB v. Phelps*, 136 F.2d 562, 565-66 (5th Cir. 1943) (agency's reliance on apparently biased hearing examiner's report violated due process). A *post hoc* opportunity to comment on the initial fact finder's recommendation cannot alleviate the effect of the fact finder's bias. *Id.* at 564 (bias in a hearing examiner taints all of the proceedings and invalidates any judgment based on them). The futility of Gulf States' "opportunity" to rebut the findings of Special Counsel is illustrated by the Commission's wholesale adoption of Special Counsel's report. Nothing in the proceedings before the Commission mitigates the lack of due process inherent in allowing Special Counsel and the Consultants to participate in the decision making process.

> system of law has always endeavored to prevent even the probability of unfairness.

In re Murchison, 349 U.S. 133, 136 (1955). *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (the requirement of an impartial and disinterested tribunal is intended to prevent unjustified and mistaken deprivations).

The specific dictates of what process is due in a given situation derive from an analysis of the governmental and private interests affected. This Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) defined three distinct factors for consideration in determining the level of process due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

When measured against these factors bearing on constitutional adequacy, the procedures used by the Commission are woefully insufficient.

A. The Private Interest Is Substantial

Gulf States obviously had a constitutionally protected property interest at stake in the proceeding before the Commission.[24] *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989). And that interest was substantial, both in absolute and constitutional terms. The issue in the Commission proceeding was whether Gulf States would be compensated for its investment in River Bend—$3 billion—that was dedicated to public service. The magnitude of the private interest at stake depends upon the

[24] The Louisiana Supreme Court agreed that Gulf States had a property interest at stake sufficient to require an evidentiary hearing of some kind. (App. 17a).

impact an erroneous deprivation would have on the party. *Mathews*, 424 U.S. at 341.[25] The erroneous deprivation by the Commission excluded a significant portion of the River Bend investment from inclusion in the Company's Louisiana rate base and thus from future recovery through rates.

A more immediate concern is the potential impact of the Commission's decision on Gulf States' current financial condition. Under the provisions of the Financial Accounting Standards Board's Statement of Financial Accounting Standards Number 90, utilities must write off investments for which rate recovery is disallowed. The impact of such a write-off would be materially adverse. Gulf States estimates that a one-time write-off (related to the Commission's decision) pursuant to this accounting standard could eliminate over one-half of the Company's retained earnings as of July 31, 1991.[26] The resulting financial condition could significantly further impair Gulf States' ability to resume payment of dividends on its capital stock, which with respect to common stock have been suspended since 1986. The further real impact of the write-off, the fact that no return will be realized on the written off portion of the asset, could also impair Gulf States' ability to attract capital and to compensate its investors for the risks assumed. *Hope*, 320 U.S. at 605.

B. The Commission's Procedure Created a High Risk of an Erroneous Deprivation

By any measure, the property interest at stake was substantial. Despite the magnitude of the interest, the Commission employed a procedure that created an unacceptable risk of an erroneous deprivation of the prop-

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[25] *See also Goldberg v. Kelly*, 397 U.S. 254 (1970); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

[26] If the decision of the Louisiana Supreme Court is not reversed, this write-off may be avoided or reduced based on future actions of the Commission, including its adoption of the deregulated asset plan discussed at App. 52a or other actions.

erty interest. The decision making process was tainted by the dual roles played by Special Counsel and the Consultants, who first acted as paid attorneys and sworn witnesses adverse to Gulf States and then acted as the initial trier of fact on the same issues they argued at the hearing.[27]

This procedure virtually guaranteed that the positions adopted by Special Counsel and the Consultants *prior to the hearing* would be adopted by the Commission *after the hearing*. Procedures that inject such potential for bias have been condemned routinely. For example, individuals with "substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).[28] Due process also prohibits an

[27] The Louisiana Court also noted that the Commission had access to "witness summaries" in addition to the Report of Special Counsel and that Gulf States did not argue that the summaries were misleading. (App. 21a). (Of course, the summaries came from the same source as the Report of Special Counsel and therefore are subject to the same claims of bias and partisanship.) The court's reliance on the lack of any objection to the accuracy of the summaries misapprehends the character of due process protections. Impartiality cannot be made to depend on a showing of lack of actual bias; such a rule would require reviewing courts to be able to probe the minds of the decision makers. Due process focuses on the risk of error in the process, not the errancy of the result. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985); *see also NLRB v. Phelps*, 136 F.2d 562, 563-64 (5th Cir. 1943) (the fact that the record contains evidence to support the judgment will not save a trial from charges of bias and prejudice). Witness summaries prepared by the parties at whom the charges of bias are leveled cannot remedy the fundamental flaws in the process.

[28] An obvious potential source of bias in the dual role of Special Counsel and the Consultants is the pecuniary interest they had in that proceeding and in future work for the Commission. As noted above, Special Counsel and the Consultants were paid for the investigation, testimony and legal argument that portrayed Gulf States as imprudent. They could hardly conclude in their Report that their original position on prudence was erroneous, when viewed from a fair and objective vantage. They especially could not admit to error if they hoped to work for the Commission again. In fact,

individual from judging a matter if it appears he or she has prejudged it as a result of participation in a pre-hearing investigation. *Kendall v. Board of Education*, 657 F.2d 1, 5 (6th Cir. 1980). The danger inherent in allowing adjudicators to hear a case despite apparently having formed firm convictions in advance of the hearing prohibits advocates from being adjudicators in the same matter. *Trans World Airlines, Inc. v. CAB*, 254 F.2d 90, 91 (D.C. Cir. 1948) ("the fundamental requirements of fairness in the performance of [quasi judicial] functions [by an administrative agency] require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case. . . .") *See also American Gen. Ins. Co. v. FTC*, 589 F.2d 462, 464-65 (9th Cir. 1979); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 765-68 (5th Cir. 1966); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266-67 (D.C. Cir. 1962).

The need to separate advocacy from adjudication and to ensure that the issues are heard by an impartial tribunal extends beyond assuring the neutrality of the ultimate decision makers: Each participant in the decision making process must be free from bias.[29] A contrary

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after the rate case the Consultant Kennedy & Associates was awarded a lucrative contract by the Commission to audit Gulf States. The Commission awarded this contract in part because the Consultant had "brought home the bacon" in the River Bend case. (Transcript of Open Session of the Commission, June 1, 1988, page 4).

[29] Thus, due process prohibits the prosecutor in an administrative proceeding from also acting as the legal advisor to the hearing board, (*Mack v. State Bd. of Dentistry*, 296 F. Supp. 1259, 1263 (S.D. Fla. 1969), *modified and vacated in part*, 430 F.2d 862 (1970)) and prohibits evidentiary hearings before a partisan fact finder, even if the final decision makers are wholly unbiased. *NLRB v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943) ("[A]n unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process. . . .") The Louisiana Supreme Court apparently believed that occasional appearances by Commissioners at some of the hearings mitigated any bias in the procedure used. These sporadic ap-

rule would permit the bias of participants to so infect the deliberations that even the most fair-minded ultimate decision maker would be unable to render a fair judgment. This is particularly so in administrative proceedings:

> Indeed, . . . the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

NLRB v. Phelps, 136 F.2d 562, 563 (5th Cir. 1943). *See also Hummel v. Heckler*, 736 F.2d 91, 93 (3rd Cir. 1984).

Special Counsel and the Consultants occupied a vital position in the decisional process in this case. The Commission accepted Special Counsel's Report as an impartial weighing of the evidence and based its decision upon the Report. (App. 184a). In fact, the Commission's Majority Opinion is little more than a verbatim copy of the Report. That Special Counsel and the Consultants could suddenly transform themselves into impartial, disinterested observ-

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pearances do not diminish the significance of the role played by Special Counsel and the Consultants in the decisional process. Moreover, Commissioner Lambert, the Commissioner in most frequent attendance, took out advertisements in several local newspapers prior to the hearing announcing that he was "firmly convinced" that Gulf States had acted imprudently in building River Bend, "particularly in view that since 1978 [he had] consistently requested that [Gulf States] abandon the nuclear plant altogether and build a coal plant instead. . . ." (App. 336a). Commissioner Lambert urged Gulf States' customers to write to the other Commissioners to support Commissioner Lambert's view on the River Bend project and Gulf States' proposed rate increase. Whether Commissioner Lambert's attendance enhanced the fairness of the procedures is at best questionable. *See Antoniou v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (due process could not be satisfied when the decision maker's public statements showed he had prejudged the matter). *Staton v. Mayes*, 552 F.2d 908, 919 (10th Cir. 1977) (same); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 589-92 (D.C. Cir. 1970) (same).

ers after months of zealous advocacy is too much to expect. Even if such a metamorphosis actually occurred, a decision making procedure that allows its component parts to be tainted by apparent bias does not comport with the requisite of due process.

> "[J]ustice must satisfy the appearance of justice" and this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."

Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980) (citations omitted).

C. Adequate Procedural Safeguards Would Protect the Government's Interest Without Additional Burden

The final element of the *Mathews* test is a consideration of the Government's interest, including the function involved and the fiscal and administrative burdens additional or substitute procedural requirements would entail. *Mathews*, 424 at 335. Louisiana, of course, has an interest in the efficient and effective functioning of its administrative agencies, including its Public Service Commission. That interest in economy and convenience, however, cannot excuse the use of procedures that do not accord the requisite constitutional protections. Although at times vexatious to this administrative process, these protections must be observed:

> The right to such a [fair and open] hearing is one of "the rudiments of fair play" assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise [of that right] on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. at 304-305 (1937) (citations omitted).

Whether due process requires a particular procedural safeguard depends, in part, on the government's "interest . . . in conserving scarce fiscal and administrative resources. . . ." *Mathews*, 424 U.S. at 348. Administrative expediency and economy do not justify abridgments of all procedural safeguards, but "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Id.* In this case, however, the cost of the required procedural safeguard is virtually nil and its value enormous.

Because the Commission did not preside over the hearings, it needed assistance in sifting through and weighing the evidence. There was no need to assign this crucial responsibility to individuals who had acted as advocates in the matter and who had an interest in the outcome. The Commission had already appointed an experienced member of its staff to act as hearing examiner in this case. That examiner was the only person in a position to weigh the evidence impartially. If he had done so, the entire question of Special Counsel's and the Consultants' participation in the Commission's deliberations would have been avoided. Allowing the hearing examiner to assist the Commission in weighing the evidence in this case, as the Commission has done in other cases,[30] would not have added a single day to the proceedings or required the employment of any additional staff.

The Constitution does not prohibit all mixings of functions in an administrative proceeding; it also does not permit any and all mixings of functions that an agency may care to employ. When the impartiality of the fact finder is at issue, the test is whether "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). If, as in *Withrow*, the

[30] *See, e.g., Radiofone, Inc. v. Public Serv. Comm'n*, 573 So. 2d 460 (La. 1991).

fact finder also makes an initial determination of probable cause, the mixing of functions is not likely to create an impermissible risk of bias. The drawing of such tentative conclusions as are sufficient to find probable cause does not by itself mean that the fact finders are "so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." *Withrow*, 421 U.S. at 57. This Court has, however, condemned the "spectacle" of a governmental official acting as a judge of his own testimony and advocacy in a hearing. *In re Murchison*, 349 U.S. 133, 139 (1955). Such a spectacle occurred in this case. Witnesses and lawyers who had tried their best in the hearing to prove that Gulf States had been imprudent were judging for the Commission whether they or their opponents had been the more credible and persuasive during the course of the proceeding. Under any "realistic appraisal of psychological tendencies and human weakness," *Withrow*, 421 U.S. at 47, the conclusion is inescapable that these hired consultants and advocates were strongly biased. Gulf States was denied its right to an impartial tribunal.

D. The Louisiana Supreme Court Erred in Upholding the Procedures Used by the Commission

Under the three-part analysis set forth in *Mathews*, the procedures used by the Commission were wholly incapable of according Gulf States due process. The Louisiana Supreme Court, however, chose not to analyze the factors enunciated in *Mathews* to test the constitutional sufficiency of the process.[31] Instead the court based its decision on its conclusion that the proceedings before the Commission were legislative in nature and on two decisions, *American Tel. & Tel. Co. v. FCC*, 449 F.2d 439 (D.C. Cir. 1971) and *Wilson & Co. v. United States*, 335 F.2d 788 (7th Cir. 1964), which suggest that in rulemakings

[31] The court cited *Mathews* as the controlling authority (App. 17a), but did not analyze or discuss how the Commission's procedures fared under the *Mathews* test.

advocates need not be excluded entirely from the decisional process. (App. 22a-23a). In both instances, the Louisiana court misconstrued the authorities on which it relies and their relevance to this case.

The Louisiana court's classification of the River Bend case as "legislative" was based on its misreading of this Court's decisions in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908) and *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350 (1989) (*NOPSI*). The issues in *Prentis* and *NOPSI* concerned the authority of federal courts to enjoin ratemaking proceedings in state or local regulatory agencies and turned on whether such proceedings were considered to be state court proceedings. *NOPSI*, 491 U.S. at 369-70; *Prentis*, 211 U.S. at 226.[32] In *Prentis* and *NOPSI*, this Court found ratemaking by a local regulatory agency to be legislative in the sense that it is an exercise of legislative power and therefore not part of the state court system. *NOPSI*, 491 U.S. at 371; *Prentis*, 211 U.S. at 226-27.

Despite the fact that *NOPSI* and *Prentis* do not address what process is constitutionally due in ratemaking, the Louisiana court confused this Court's statements in those cases that ratemaking is "legislative" in nature with the distinction made for due process purposes between administrative adjudications and legislative-type rulemakings. *See United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-45 (1973). The distinction is significant because due process requires different (and generally greater) pro-

[32] In *Prentis*, the precise issue was whether a federal statute prohibiting federal courts from enjoining state court proceedings applied to a rate case before a state regulatory commission. *Prentis*, 211 U.S. at 223. Similarly, *NOPSI* involved the abstention principles announced in *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine requires federal courts to refrain from enjoining state administrative proceedings that constitute "state judicial proceedings." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). The issue in *NOPSI*, therefore, was whether ratemaking in a local commission was such a state court proceeding. *NOPSI*, 491 U.S. at 369-70.

cedural safeguards in an adjudication than are imposed in a rulemaking. *See Lead Industries Assoc. v. EPA*, 647 F.2d 1130, 1178-80 (D.C. Cir. 1980).

Nothing in *Prentis* or *NOPSI* suggests that the lesser procedural protections associated with rulemakings are appropriate in the present case. To the contrary, in *Morgan v. United States*, 298 U.S. 468 (1936), this Court observed that, although ratemaking orders are "legislative," the ratemaking process is a "proceeding of a *quasi judicial* character." *Id.* at 479-80. This Court has consistently treated ratemaking for individual utilities as adjudicative proceedings in the due process sense, which require a full, fair hearing. *See Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Tel. Co. v. Public Utils. Comm'n*, 301 U.S. 292 (1937); *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88 (1913).[33]

The error in the Louisiana court's conclusion that, for due process purposes, this case is more akin to legislative rulemaking than adjudication is apparent in its reliance on *American Tel. & Tel.* and *Wilson*. Although both cases involved administrative proceedings dealing with future rates, the proceedings in question were deemed to be rulemakings. *American Tel. & Tel.*, 449 F.2d at 454-55; *Wilson*, 335 F.2d at 796-97. In *American Tel. & Tel.*, the court explained why the proceeding before it was a rulemaking, not an adjudication.

> [T]he rate practice prescribed by the Commission . . . is for the future, and no issue of damages for past acts was involved. . . . [T]he key questions of fact here were "legislative" rather than "adjudicatory"—that is, they were matters of statistics, economics, and ex-

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[33] This Court also has distinguished single utility ratemaking from general rulemakings, which do not require the full panoply of procedural safeguards traditionally associated with adjudication. *See United States v. Florida E. Coast Ry.*, 410 U.S. 224, 242-44 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 165 (1951) (Frankfurter, J., concurring).

> pert interpretation rather than questions of whether AT&T had violated some norm . . . .

American Tel. & Tel., 449 F.2d at 454-55.

Conversely, the crux of this case concerned Gulf States' past actions, the propriety of those actions when measured against the "norm" of prudence, and the extent of the damages flowing from Gulf States' alleged imprudence. The questions here concerned the immediate parties and required a determination of who did what, when, where and with what motive. These are the hallmarks of an adjudication. *See Association of Nat. Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161-64 (D.C. Cir. 1979). Had the Louisiana court measured the sufficiency of the procedural safeguards accorded Gulf States by the rigorous standards applicable to adjudications, rather than the less demanding standards applicable to rulemaking, it would have found those procedures unconstitutional.

CONCLUSION

A bright line test for the requisite due process safeguards in administrative proceedings is impossible, because " 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). It is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The adequacy of a procedural scheme in an administrative proceeding is a function of the type of issue being decided. As the Court explained in *Mathews*, 424 U.S. at 343, "Central to the evaluation of any administrative process is the nature of the relevant inquiry." In administrative rulemakings and other like proceedings, mixing investigative and adjudicative functions may be appropriate. In this case, where compensation for property interests valued in the billions of dollars is being determined based on issues of credibility and veracity, a higher level of procedural protection is

required. Without adequate procedural safeguards, including an unbiased and disinterested fact finder, Gulf States could not receive its right to a fair trial in a fair tribunal.

This Court should grant a Writ of Certiorari and set the case for full briefing and argument on the merits. The federal issue is too important, and has too great an impact on the regulation of substantial property interests vital to the national welfare, for the Louisiana courts and regulators to be permitted to dispense with the requirement of a fair hearing in a fair tribunal.

Respectfully submitted,

CECIL L. JOHNSON
DONALD M. CLEMENTS, JR.
GULF STATES UTILITIES COMPANY
P.O. Box 2951
Beaumont, TX 77704
(409) 838-6631

EDGAR M. ROACH, JR.*
WILLIAM D. JOHNSON
HUNTON & WILLIAMS
One Hannover Square
Raleigh, NC 27601
(919) 899-3000

TOM F. PHILLIPS
FRANK M. COATES, JR.
FREDERICK R. TULLEY
JAMES L. ELLIS
TAYLOR, PORTER, BROOKS & PHILLIPS
P.O. Box 2471
Baton Rouge, LA 70821
(504) 387-3221

Counsel for Gulf States Utilities Company

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* Counsel of Record